

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
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<b>JOVANNI GIUSEPPE WHYTE BEY</b>	:	DETERMINATION
	:	DTA NO. 850261
	:	
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2018 and 2019.	:	

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Petitioner, Jovanni Giuseppe Whyte Bey, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2018 and 2019.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Amanda K. Alteri, of counsel), filed a motion, on January 31, 2023, for summary determination in the above-referenced matter pursuant to section 3000.9 (b) of the Tax Appeals Tribunal’s Rules of Practice and Procedure. Petitioner, appearing pro se, replied to the motion by March 2, 2023, which date commenced the 90-day period for issuance of this determination.

Based upon the Division of Taxation’s motion papers, petitioner’s reply to the motion, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation has established that no material facts exist such that summary determination may be granted in its favor.

***FINDINGS OF FACT***

1. Petitioner, Jovanni Giuseppe Whyte Bey, filed a New York State resident income tax return (form IT-201) for the tax year 2018 on or about March 31, 2020. On this return, he reported \$0.00 for all items of income and requested a refund in the amount of \$1,007.00. The requested refund equaled the amount of his New York State tax withheld for 2018.

2. The Division of Taxation (Division) conducted an audit of tax year 2018 based upon petitioner's failure to report income on his form IT-201. On January 19, 2021, the Division issued an account adjustment notice - personal income tax to petitioner. It allowed a partial refund in the amount of \$385.57, after adjusting petitioner's New York wage income to include the amount of \$23,624.00 reflected on his form W-2 wage and tax statement for the year 2018 that he failed to report on his form IT-201.

3. On or about March 31, 2020, petitioner filed a form IT-201 for the tax year 2019. On his return, petitioner reported \$0.00 for all items of income and requested a refund in the amount of \$958.00. The requested refund equaled the amount of his New York State tax withheld for 2019.

4. On May 8, 2020, the Division issued an account adjustment notice – personal income tax to petitioner. It allowed a partial refund in the amount of \$326.00, after adjusting petitioner's New York State wage income to include the amount of \$23,131.00 as reflected on his form W-2 wage and tax statement for the year 2019 that he failed to report on his form IT-201.

5. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the two notices of account adjustment. A conciliation conference was conducted on April 26, 2022.

6. On July 22, 2022, BCMS issued a conciliation order, CMS No. 329200, that denied the refund claims and sustained the notices of account adjustment.

7. On September 1, 2022, petitioner filed a timely petition with the Division of Tax Appeals protesting the conciliation order and asserting additional claims.

8. Petitioner continues to contest the balance of his refund claims. Additionally, he seeks a refund in the amount of \$6,110,000.00. Petitioner claims this refund based on article 26 of the Tax Law. Specifically, petitioner references gift and estate tax and generation-skipping transfer tax returns.

9. On November 23, 2022, the Division filed its answer to the petition and requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous petition.

10. On December 19, 2022, petitioner filed a response to the Division's answer in which he moved to strike a frivolous defense. In sum, petitioner argues that the Division is on notice that he is protesting multiple tax years and not only the years 2018 and 2019 addressed by the conciliation order. Petitioner argues that the Division is attempting to bypass his protest of multiple tax years.

11. By correspondence dated December 27, 2022, the Supervising Administrative Law Judge informed petitioner that the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) require that any reply to an answer filed by the Division must be made within 20 days of the answer.

12. Thereafter, on January 6, 2023, petitioner replied that the time frame, from which the 20 days to file a reply, should commence on the date he received the answer from the Division, and not on the date the answer was mailed.

13. On January 31, 2023, the Division filed its motion for summary determination. Included with its motion papers are: (i) the affirmation of Amanda K. Alteri; (ii) an affidavit, dated January 31, 2023, of Joseph Giuffre, a Tax Technician 1, employed by the Division; (iii) copies of petitioner's forms IT-201 for the tax years 2018 and 2019; (iv) copies of the account adjustment notices, dated January 19, 2021 and May 8, 2020, respectively, for the tax years 2018 and 2019; and (v) the conciliation order dated July 22, 2022.

14. Mr. Giuffre has been employed by the Division for 19 years. As a Tax Technician 1 in the Income Franchise Desk Audit Bureau, he reviews and processes New York State personal income tax returns, conducting audits and resolving protests. These responsibilities include communicating with taxpayers and preparing administrative records, reports and forms.

15. Mr. Giuffre explained his review of petitioner's forms IT-201 for the years 2018 and 2019. The Division conducted an audit of petitioner because he claimed \$0.00 in income on his forms IT-201, yet his employer, SCO Family of Services located in Glen Cove, New York, issued him a W-2 wage and tax statement for 2018 that reflected wage income in the amount of \$23,062.44 and a W-2 wage and tax statement for 2019 that reflected wage income in the amount of \$23,161.16.

16. Mr. Giuffre explained that the Division issued account adjustment notices to petitioner after it recomputed petitioner's forms IT-201 to include the wage income received by him for 2018 and 2019, and issued refunds based upon the adjustments.

17. In opposition to the motion, petitioner submitted his affidavit, dated February 14, 2023, wherein he asserts that his correspondence, filed on December 19, 2022, in reply to the Division's answer be accepted as timely filed. Petitioner argues, among other things, that he is

entitled to attorney's fees, damages, pre-judgment and post-judgment interest and monetary relief over \$100,000.00, but not to exceed \$6,110,000.00, that relates to a real property interest.

### **CONCLUSIONS OF LAW**

A. Preliminarily, petitioner argues that his reply to the answer should be deemed timely filed. Section 3000.4 (c) of the Rules states that petitioner must file his reply within 20 days after service of the answer. The answer was served on November 23, 2022, and petitioner did not file his reply until December 19, 2022. Petitioner's argument that the time frame within which to file his reply should commence on the date that he received the answer is without merit. Accordingly, his reply to the answer was properly rejected as untimely filed.

B. A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" (20 NYCRR 3000.9 [b] [1]). Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). "If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts," then a full trial is warranted and the case should not

be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

C. When the Division issues a notice to a taxpayer, a presumption of correctness attaches to it and it is incumbent upon petitioner to demonstrate that the notice was erroneous (*see Matter of Gilmartin v Tax Appeals Trib.*, 31 AD3d 1008 [3d Dept 2006]; *see also Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; Tax Law § 689 [e]).

D. Pursuant to Tax Law § 612 (a), the New York adjusted gross income of a resident individual means, in pertinent part, “his federal adjusted gross income as defined in the laws of the United States for the taxable year . . . .” Internal Revenue Code (IRC) (26 USC) § 62 (a), in turn, generally defines adjusted gross income as gross income less certain enumerated deductions. The enumerated deductions do not include wage income.

IRC (26 USC) § 61 (a) defines the term “gross income” as “all income from whatever source derived . . . .” This section also provides a non-exhaustive list of items that constitute gross income including, inter alia, “[c]ompensation for services, including fees, commissions, fringe benefits, and similar items” (IRC [26 USC] § 61 [a] [1]).

IRC (26 USC) § 3401 (a) defines the term “wages,” for purposes of income tax withholding, in pertinent part, as: “. . . all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash.”

E. The Division has established that there are no material issues of fact. The Division

has introduced petitioner's forms IT-201 for the years 2018 and 2019 which included W-2 wage and tax statements that demonstrated that petitioner failed to include his wage income on his tax returns for both 2018 and 2019. Petitioner has offered no argument or proof that his income is exempt from income tax in accordance with any of the exceptions to the definition of "wages" contained in IRC (26 USC) § 3401 (a). Accordingly, the Division properly recomputed his tax liability for the years 2018 and 2019 and adjusted the amounts of his refunds.

F. Next, petitioner argues for relief under article 26 and former articles 26-A and 26-B. The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008; *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom New York State Dept. of Taxation and Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [Sup Ct, Albany County 1991, Keniry, J.]). Its power to adjudicate disputes is exclusively statutory (*id.*). The Division of Tax Appeals is authorized "[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . . unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter" (Tax Law § 2006 [4]).

All proceedings in the Division of Tax Appeals "shall be commenced by the filing of a petition . . . protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application . . . or any other notice which gives a person the right to a hearing . . ." (Tax Law § 2008 [1]).

Petitioner has not provided any statutory notice that confers jurisdiction on the Division of Tax Appeals to address his claims made pursuant to article 26 and former articles 26-A (gift tax) and 26-B (generation-skipping transfer tax). Moreover, chapter 389 of the Laws of 1997 repealed article 26-A, effective January 1, 2000, and chapter 59 of the Laws of 2014 repealed

